

Declaratory Judgments in Louisiana

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ming pool. Plaintiff maintained that the homeowner's mother, who had given the youth permission to swim in the pool, was the servant of the homeowner and liability was imputable to the homeowner under a master-servant relationship. The First Circuit decided the mother was a *non-servant* agent of the homeowner, empowered only to maintain the property, and thus no liability was imputable to either her son or his insurer. It is submitted that such a result is correct and an examination of the relationship involved will yield a proper result in every case embracing the doctrine of respondeat superior.

John S. Odom, Jr.

DECLARATORY JUDGMENTS IN LOUISIANA

The Declaratory Judgments Act¹ has been the source of considerable confusion for both the courts and the practicing bar. This apparently has stemmed from a misunderstanding of the basic nature of declaratory relief, the nature of the action.²

Basically, a declaratory judgment declares the rights, status or legal relations of the parties.³ It gives a party a remedy that supplements the remedies heretofore available, and differs from a conventional remedy in that while a conventional remedy is accompanied by a granting of damages or other relief, the declaratory judgment stands alone.⁴

"The conventional type of judgment embodies two elements: (1) an ascertainment or declaration of the rights of the parties (usually implied); and (2) a specific award of relief. The declaratory judgment embodies only the first element which, of course, is always express."⁵

Thus, declaratory relief can be viewed as a lesser form of relief

1. LA. CODE CIV. P. arts. 1871-83. This legislation is modeled on the Uniform Declaratory Judgments Act and bears a close resemblance to the federal declaratory judgments statutes as well as the legislation in other states based on the uniform act.

2. This Comment does not purport to examine all phases of the Declaratory Judgments Act. It attempts to deal with some of the basic concepts underlying declaratory judgments so as to aid the practitioner in utilizing them.

3. Succession of Rickerfor, 120 So.2d 320 (La. App. Or. Cir. 1960).

4. E. BORCHARD, DECLARATORY JUDGMENTS 25 (1941); Succession of Rickerfor, 120 So.2d 320 (La. App. Or. Cir. 1960).

5. LA. CODE CIV. P. art. 1871, comment.

where the plaintiff receives only a portion of what he would have received under a conventional judgment.

The nature of the remedy has far-reaching consequences on the action. To be entitled to conventional relief, a plaintiff must show that the defendant has acted, has failed to act, or is threatening immediate action which poses the threat of irreparable harm.⁶ Declaratory relief, because of its *nature*, makes it possible to adjudicate a grievance at an earlier time than would otherwise be allowed. The relief becomes anticipatory to the performance or imminent threat of performance of a harmful act by the prospective defendant.⁷ The remedy becomes available when a claim against the interest of the prospective plaintiff comes into existence; the declaration merely enunciates the rights of the parties as they then exist without purporting to award damages or restrain activity. As stated in Code of Civil Procedure article 1881,⁸ the purpose of declaratory judgments is to settle and afford relief from uncertainty and insecurity. Thus, the existence of declaratory relief makes actionable the legal uncertainty or insecurity of the plaintiff.

Recognition of such a situation as allowing an interested person to sue gives rise to a type of action heretofore unknown under the conventional remedies.⁹ A party who would be a defendant in a conventional lawsuit can, at times, seek a declaration of nonliability, arguing that the existence of a claim adverse to his interest has placed him in a position of uncertainty, and thus entitles him to a declaratory judgment. In this anticipatory type of action a declaratory judgment is an exclusive remedy since the right to relief is based solely on the declaratory judgments statutes. This type of action for a declaratory judgment can therefore be viewed as a pure declaratory judgment.

6. Ordinary conventional remedies, such as judgments for damages, contemplate a plaintiff having suffered harm at the time the action is brought. Extraordinary remedies, such as injunctive relief, are anticipatory but contemplate the threat of immediate action with irreparable harm where no other adequate remedy exists. *See* LA. CODE CIV. P. art. 3601.

7. E. BORCHARD, DECLARATORY JUDGMENTS 28 (1941); Lee, *The Declaratory Judgments Act*, 20 TUL. L. REV. 566 (1946).

8. LA. CODE CIV. P. art. 1881: "Their purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered."

9. E. BORCHARD, DECLARATORY JUDGMENTS 19-20 (1941). Examples of the use of this procedure in Louisiana are: *Burton v. Lester*, 227 La. 347, 79 So.2d 333 (1955); *Hartford Fire Ins. Co. v. Roger Wilson, Inc.*, 252 So.2d 161 (La. App. 3d Cir. 1971); *Marathon Ins. Co. v. Warner*, 244 So.2d 353 (La. App. 2d Cir. 1971).

However, a declaratory judgment may be an alternative remedy. Borchard states that the fact "that no coercive decree is sought . . . enables actions to be brought for a declaratory judgment on two different types of operative facts: (a) those which might also have justified an action for an executory (coercive) judgment or decree, or (b) those which are not susceptible of any other relief."¹⁰ When a declaratory judgment is requested on facts which would justify an action for a conventional judgment, the declaratory remedy is alternative.¹¹ Presumably, when a plaintiff asks only for declaratory instead of executory relief, he is, for whatever reason, satisfied with the lesser remedy and should be granted the relief unless the purpose and function of the Declaratory Judgments Act cannot be accomplished.

Although the nature of declaratory relief has had a profound effect on the nature of the action, the form of the action has not been altered and is that of an ordinary action:

"[T]he conditions of the usual action, procedural and substantive, must always be present, namely, the competence or jurisdiction of the court over the parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings (including process, pleadings, and evidence), the existence of operative facts justifying judicial declaration of the legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment in his behalf."¹²

Professor McMahon in the official comments to article 1871 states: "There is actually no such thing as a declaratory action, even if the sole relief prayed for is a declaratory judgment. The action is identical, regardless of whether greater or lesser relief is prayed for; the difference is only as to the type of judgment to be rendered."¹³

A declaratory judgment should be regarded as an additional

10. E. BORCHARD, *DECLARATORY JUDGMENTS* 26 (1941).

11. *Id.* at 27.

12. *Id.* at 26 (1941).

13. LA. CODE CIV. P. art. 1871. *But see* *Vignes v. Jarreau*, 222 So.2d 566 (La. App. 1st Cir. 1969), in which the court reasoned that an action for a declaratory judgment is in the nature of a summary proceeding.

remedy, subject to the rules governing ordinary proceedings, which because of its nature creates a right of action at a point in time when the case would not be cognizable by a court applying traditional remedies. Although it differs from conventional remedies in that specific relief is not awarded as a matter of course, the proper view is that declaratory relief is in the nature of ordinary conventional relief rather than an extraordinary remedy such as an injunction. Thus, declaratory relief should be available to the plaintiff at any time provided that grounds for discretionary refusal to grant the declaration do not exist. Conversely, the granting of declaratory relief should not be contingent upon the absence of another adequate remedy such as an injunction.¹⁴

Justiciable Controversy: Adversity of Parties

In an action for a declaratory judgment, just as in an action for any other type of judgment, the question presented to the court must pose a justiciable controversy.¹⁵ The courts have stated repeatedly that they will not decide moot¹⁶ or remote questions, nor give advisory opinions.¹⁷

Although the fact that a declaratory judgment is prayed for has the effect of making litigation possible at an earlier time than it could ordinarily be commenced,¹⁸ the fact that a declaratory judgment is requested does not relax the standards of justiciability,¹⁹ rather, a new standard is imposed to determine when an actual controversy exists. In situations where a declaratory judgment is ordinarily an alternative remedy, i.e., where plaintiff would be justified on the facts in seeking a con-

14. See LA. CODE CIV. P. art. 3601. A comparison of the language of the injunction provision with that of article 1871 clearly indicates the different scope of the remedies.

15. *Abbott v. Parker*, 259 La. 279, 249 So.2d 908 (1971); *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964); *Orleans Parish School Bd. v. City of New Orleans*, 238 La. 748, 116 So.2d 509 (1959); *Superior Oil Co. v. Reilly*, 234 La. 621, 100 So.2d 888 (1958); *State v. Board of Supervisors, La. State Univ.*, 228 La. 951, 84 So.2d 597 (1955); *Tugwell v. Board of Highways*, 228 La. 662, 83 So.2d 893 (1955).

16. *Tugwell v. Board of Highways*, 228 La. 662, 83 So.2d 893 (1955).

17. *Stoddard v. City of New Orleans*, 246 La. 417, 165 So.2d 9 (1964). But see *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So.2d 845 (1961).

18. See note 6 *supra* and accompanying text.

19. E. BORCHARD, *DECLARATORY JUDGMENTS* 33 (1941).

ventional remedy, justiciability is not usually an issue.²⁰ However, where only declaratory relief is available, the concept of justiciable controversy is practically merged with the issue of the existence of a cause of action. To a large degree the existence of a justiciable controversy means that the plaintiff has a cause of action due to the fact that declaratory relief makes legal uncertainty or insecurity actionable.²¹

In *Tugwell v. Members of Board of Highways*,²² a justiciable controversy was defined as being a specific adversary question or controversy, asserted by interested parties, and based on an existing state of fact. The issue presented must not be academic, theoretical, or based upon a contingency which may or may not arise. Recently in *Abbot v. Parker*,²³ a justiciable controversy was defined as an actual and substantial dispute, which involves the legal relations of parties having real adverse interests, upon which the judgment of the court may effectively operate through a decree of a conclusive character. Further, the dispute should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

The determination of when an actual controversy comes into existence turns upon the difference between the justiciable controversy problem in a suit for a declaratory judgment and a conventional suit. Actual controversy concerns both adversity and whether there is sufficient relationship between the interest of the plaintiff and the claim, action, or position of the defendant.²⁴ Sufficiency of the relationship exists when the defendant's position has an effect upon plaintiff that is legally cognizable. In a conventional suit, the requirement for an actual controversy is satisfied if the plaintiff has suffered harm or is immediately in danger of suffering harm. In an action for a declaratory judgment the standard becomes a determination of whether defendant's position places plaintiff in a state of uncertainty so that

20. The problem generally does not arise in these situations because the controversy, by maturing, fits easily within the traditional concepts determining justiciable controversies.

21. LA. CODE CIV. P. arts. 1871, 1880; E. BORCHARD, DECLARATORY JUDGMENTS 28 (1941).

22. 228 La. 662, 83 So.2d 893 (1955). Here the court gave a declaration as to one question presented, concerning the validity of a statute, and then refused to consider a second question. The court reasoned that decision of the first question rendered the second contingent upon facts that might not arise and thus it was not justiciable.

23. 259 La. 279, 249 So.2d 908 (1971).

24. E. BORCHARD, DECLARATORY JUDGMENTS 40 (1941).

if defendant acts in accordance with his position, plaintiff's interest will be affected. In other words, is plaintiff actually in a state of legal uncertainty?

The cases in which the courts have denied relief due to the absence of an actual controversy generally follow the principles enunciated above.²⁵ In *Abbott v. Parker*,²⁶ the court found no possibility of a dispute where payment of the domed stadium indebtedness could not interfere with payment of the state's other bonded indebtedness since present and projected state revenue was more than sufficient for bond retirement purposes. In *Stoddard v. City of New Orleans*,²⁷ a permissive state industry promotion statute which needed local approval to become effective did not give rise to an actual controversy where no steps to implement the statute had been taken or were planned locally. In *Watermeier v. Louisiana Stadium and Exposition District*,²⁸ a complaint that bonds could not be sold within authorized interest rates because of market conditions was held not to be an actual controversy absent an attempt to sell the bonds at an interest rate in excess of that authorized.

In *Theodus v. City of Bossier City*, the plaintiff sued to have his establishment declared a restaurant within the terms of the state closing law. The court denied declaratory relief, finding no actual controversy where the statute was not being enforced against plaintiff.²⁹ This result seems clearly contrary to both

25. In the following cases the court found the existence of an actual justiciable controversy: *Plebst v. Barnwell*, 243 La. 874, 148 So.2d 584 (1963) (an attack upon the constitutionality of a zoning ordinance); *Fields v. Transtates Petro., Inc.*, 246 So.2d 887 (La. App. 2d Cir. 1971) (a declaration of rights under a sheriff's deed); *Porter v. Hawkins*, 240 So.2d 912 (La. App. 4th Cir. 1970) (declaration of the invalidity of an out-of-state divorce decree); *Baddock v. State, Dept. of Highways*, 142 So.2d 448 (La. App. 1st Cir. 1962) (attack upon the validity of an expropriation statute); *Theodos v. City of Bossier City*, 106 So.2d 851 (La. App. 2d Cir. 1958) (validity of a city closing ordinance); *Schreiner v. Weil Furniture Co.*, 68 So.2d 149 (La. App. Orl. Cir. 1953) (seeking a declaration of rights under the terms of a contract).

26. 259 La. 279, 249 So.2d 908 (1971). A number of issues were presented to the court; some were disposed of by the finding of no actual controversy, while others were found not to present a controversy of sufficient immediacy to justify judicial resolution. This is the *only* Louisiana decision which predicates the lack of a justiciable controversy on lack of immediacy.

27. 246 La. 417, 165 So.2d 9 (1964).

28. 235 So.2d 114 (La. App. 4th Cir. 1970).

29. 106 So.2d 851 (La. App. 2d Cir. 1958). The court would have been correct if the statute had been in effect for some time and had never been enforced.

the concept of an actual controversy under an action for a declaratory judgment and the express language of article 1872.³⁰ The fact that he claimed a right under a statute and the state refused to accede to that claim would seem to present an actual controversy.

Several cases which the courts have declared moot because an actual controversy did not exist demonstrate the ability of the judiciary to render ineffectual the benefits of the declaratory judgments statutes.³¹ In each case the appellate court declared the question moot where defendant had continued his activities and they were completed by the time of the appellate hearing. It is submitted that this situation is not properly one of lack of actual controversy merely because the defendant has completed his activities and declaratory relief alone is no longer sufficient. The courts should have decided the cases on the merits and issued a declaration; if the plaintiffs prevailed the declaration would have been the basis for supplemental relief under article 1878.

Justiciable Controversy: Real Interest of Parties

Another requirement for a justiciable controversy is that the parties have a real interest in the matter being litigated.³² The concept of interest of the parties is substantially the same in a suit for a declaratory judgment as in any other type of action.³³ The attorney general was held to have no interest in having state

30. LA. CODE CIV. P. art. 1872: "A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

31. *A to Z Paper Co. v. State Bd. of Educ.*, 251 So.2d 643 (La. App. 1st Cir. 1971) (bid to supply materials; by the time of appeal the contract had been performed and the court considered the question moot); *Wilshire South Ass'n v. Jefferson Parish Zoning Appeals Bd.*, 181 So.2d 866 (La. App. 4th Cir. 1966) (action to have the court interpret a parish zoning ordinance; building complained of was complete when appeal was heard, question moot); *Graham v. St. Rita Roman Catholic Church*, 146 So.2d 666 (La. App. 4th Cir. 1962) (question of propriety of building in violation of a restrictive covenant held moot after building completed and occupied).

In *Baddock v. State, Dept. of Highways*, 142 So.2d 448 (La. App. 1st Cir. 1962), the defendant continued its activities in the face of a suspensive appeal and received a sharp rebuke from the court. This would seem to indicate that the suspensive appeal is the proper procedural device to prevent defendant from rendering the case moot while on appeal.

32. *Abbott v. Parker*, 259 La. 279, 249 So.2d 908 (1971); *Tugwell v. Board of Highways*, 228 La. 662, 83 So.2d 893 (1955).

33. *E. BORCHARD, DECLARATORY JUDGMENTS* 50 (1941).

statutes declared constitutional in *State v. Board of Supervisors*.³⁴ There the court served notice that the declaratory judgment procedure was not to be used by the state to obtain advisory opinions on the constitutionality of statutes. *Superior Oil Co. v. Reily*³⁵ held a lessee had no interest where the state had a royalty interest by deed of donation and the lessee questioned whether severance taxes were due on the state's share. In *Petition of Sewage & Water Board*,³⁶ the court found no justiciable controversy where the defendant disclaimed its interest in the litigation. *Hasting v. McDowell*³⁷ held a judgment creditor lacked sufficient interest to bring an action for a declaratory judgment to have property in the debtor's wife's name declared community property. In *Gerriero v. City of Monroe*,³⁸ a lessor lacked sufficient interest to attack a city closing ordinance where the lessee had informed the lessor of his intent not to renew the lease because of the closing ordinance. The court reasoned that since the lease contained no terms concerning the right to sell alcohol at all hours, the lessor was affected only indirectly and thus lacked sufficient interest. Generally, problems with respect to justiciable controversies differ in no material respect whether a declaratory judgment or some other remedy is involved; however, the issue is raised more often due to the low threshold of the action necessary for a declaratory judgment.

Scope of Declaratory Relief

The terms of article 1871,³⁹ the general grant of authority to

34. *State v. Board of Supervisors*, La. State Univ., 228 La. 951, 84 So.2d 597 (1955). Apparently the reasoning upon which the lack of interest of the attorney general is based is that the constitutionality of a statute is presumed until declared otherwise and thus the state, its officers or its citizens have no interest in having a statute declared constitutional.

35. 234 La. 621, 100 So.2d 888 (1958).

36. 248 La. 169, 177 So.2d 276 (1965). The Sewage and Water Board, citing the City of New Orleans as defendant, sought to have a constitutional amendment authorizing a bond issue declared valid. The city disclaimed any interest in the matter. The court held there was no justiciable controversy. Although this case turned on the lack of interest by the defendant, perhaps it can also be aligned with the cases holding that officials have no interest in having statutes or other enactments declared constitutional.

37. 75 So.2d 383 (La. App. 1st Cir. 1954). It is not entirely clear to what extent this decision is based upon lack of interest because the court also reasoned that plaintiff had another adequate remedy and the mood of the times was that another adequate remedy precluded declaratory relief.

38. 136 So.2d 305 (La. App. 2d Cir. 1961).

39. LA. CODE CIV. P. art. 1871: "Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall

render declaratory judgments, disclose no inherent limitation as to the types of cases in which declaratory judgments are proper. Article 1875⁴⁰ indicates the expansive scope of the declaratory judgment procedure by stating that the types of cases enumerated in articles 1872, 1873, and 1874 are not exclusive.⁴¹ The supreme court, in *Petition of Sewage & Water Board*,⁴² stated by way of dicta that a declaratory judgment can be utilized in all types of litigation. Thus, on its face, a declaratory judgment is applicable to any type of case.

However, this position appears to be subject to at least two exceptions. First, where the legislature has provided an exclusive procedure for a certain type of case, an action for a declaratory judgment would be improper if it were not the procedure so provided.⁴³ The recent case of *Vignes v. Jarreau*⁴⁴ appears to be predicated on this principle. Plaintiff brought an action for a declaratory judgment to establish a boundary between his property and defendant's. He sought to prove the boundary by testimony of a surveyor he had hired. The First Circuit held that the statutes governing boundaries evidenced an intent that actions for boundary could be determined only in ordinary actions and an action for a declaratory judgment is in the nature of a summary proceeding. The supreme court denied writs stating that the result was correct. The case has been criticized,⁴⁵ and appears to be an improper view of the nature of an action

be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree."

40. LA. CODE CIV. P. art. 1875: "The enumeration in Articles 1872 through 1874 does not limit or restrict the exercise of the general powers conferred in Article 1871 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

41. LA. CODE CIV. P. art. 1872 provides for declaratory relief with respect to deeds, wills, contracts and ordinances or statutes. LA. CODE CIV. P. art. 1873 provides for declaration of contract rights before as well as after breach. LA. CODE CIV. P. art. 1874 pertains to declaration of rights arising out of relationships such as executors, trustees, creditors, etc.

42. 248 La. 169, 177 So.2d 276 (1965).

43. E. BORCHARD, DECLARATORY JUDGMENTS 342 (1941).

44. 222 So.2d 566 (La. App. 1st Cir. 1969).

45. See *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Procedure*, 30 LA. L. REV. 286, 294 (1970). Judge Tate argues that the court is in error. First, the procedure is not summary since it is not found in the Code of Civil Procedure section on summary proceedings, and second, the Civil Code does not prescribe a method of trying boundary cases but only a method of proving or establishing boundaries.

for a declaratory judgment and thus an improper application of the principle.

The second possible exception concerns obtaining a declaratory judgment in a tort action based on negligence. In the federal system and in many states there is a general policy against either party securing a declaration of liability or non-liability in the absence of extraordinary circumstances.⁴⁶

Although there is no Louisiana jurisprudence holding that a declaratory judgment is improper in an action based on negligence, *Burton v. Lester*⁴⁷ contains *dicta* to the effect that an action for a declaratory judgment should not be extended to delicts or quasi delicts in the absence of extraordinary circumstances. This position is based generally on the proposition that the plaintiff in a tort action should have his choice of forum and time of confrontation, and when the matter is presented to the court, it should be in a posture so that damages as well as liability can be adjudicated in order to serve the purpose of judicial efficiency.⁴⁸

At the present time in Louisiana, it is impossible to ascertain the precise scope of declaratory judgments because many types of cases have yet to be presented to the courts in a declaratory judgment context. However, since the revision of article 1871,⁴⁹ the courts have been increasingly liberal in permitting use of declaratory judgments so it is anticipated that they will eventually give the procedure a wider scope in Louisiana.

Discretion of a Court to Deny Declaratory Relief

The scope of the declaratory judgments statutes is rather broad, and thus relatively few cases will fall outside it so as to

46. *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969); *Sun Oil Co. v. Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280 (E.D. Pa. 1952). The court in *Sun Oil* views the determination of liability in a suit based on negligence as being normally outside the purposes of the declaratory judgments act; however, at times a declaratory judgment may be proper if it serves the interest of justice or the convenience of the parties.

47. 227 La. 347, 79 So.2d 333 (1955). The continuing authority of this case is of some doubt since the holding of the case was overruled legislatively by amendment of LA. CODE CIV. P. art. 1871 in 1960. However, it is quite likely that the courts today would refuse declaratory relief in negligence cases, if not on the authority of *Burton v. Lester*, then perhaps on authority from the federal system.

48. *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969).

49. See note 53 *infra* and accompanying text.

absolutely deny declaratory relief. However, an effective narrowing of that scope is achieved through granting the courts discretion not to entertain actions for declaratory relief.⁵⁰ Borchard states:

"The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed."⁵¹

These principles are expressed in article 1876, which provides that declaratory relief may be denied where it would not terminate the uncertainty or controversy.⁵² In addition, language in article 1871 has a bearing on discretion; the second sentence of the article is to the effect that "the existence of another adequate remedy will not preclude"⁵³ declaratory relief where appropriate. These two articles when read together describe the parameters of the exercise of well-founded judicial discretion. Obviously, discretion to refuse declaratory relief cannot be based merely on the existence of another adequate remedy. The appropriateness of declaratory relief is to be determined by the criteria of article 1876. Those criteria would seem to be whether or not the declaratory judgment will terminate the controversy, or if the declaratory judgment will settle an issue and serve a useful purpose in clarifying the situation.

The Louisiana courts have yet to give a systematic interpretation to articles 1876 and 1871 on this point. Some early cases, which were decided on the lack of a justiciable controversy, held that the granting of declaratory relief is a matter solely within the discretion of the court, without setting any

50. See generally *Zemel v. Rusk*, 381 U.S. 1 (1965) (the court has the discretion to hear an action for a declaratory judgment rather than the litigant having a right to have it heard).

51. E. BORCHARD, *DECLARATORY JUDGMENTS* 299 (1941).

52. LA. CODE CIV. P. art. 1876: "The Court may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding."

53. LA. CODE CIV. P. art. 1871. This phrase was enacted to overrule a line of jurisprudence holding that existence of another adequate remedy vested the court with discretion to refuse declaratory relief.

standards.⁵⁴ Later cases set forth vague standards⁵⁵ which amounted to little more than a reiteration of the language of the code articles. In *Huff v. Justice*,⁵⁶ the court predicated its decision on article 1876 but based the discretionary refusal of declaratory relief on a finding that the plaintiff lacked interest in the matter. Certainly, this is reason for not granting relief, but it is much more basic than discretion; it goes to the lack of a justiciable controversy.

The Louisiana courts have held on two occasions that hearing a suit for a declaratory judgment was an abuse of discretion. In *Burton v. Lester*,⁵⁷ the entertaining of a suit for a declaratory judgment which presented issues before another forum was held to be abuse.⁵⁸ In *Theodos v. City of Bossier City*,⁵⁹ where a criminal action pending against plaintiff involved the same question as that posed in the action for a declaratory judgment, the trial court was held to have abused its discretion by hearing the civil action. Where a question has already been submitted to a tribunal for resolution, an additional suit in another forum serves no useful purpose and impedes judicial efficiency. Therefore, both of these decisions appear to be justified.

Further Relief Clause: Code of Civil Procedure Article 1871

As stated earlier, the nature of a declaratory judgment makes

54. *Superior Oil Co. v. Relly*, 234 La. 621, 100 So.2d 888 (1958); *State v. Board of Supervisors, La. State Univ.*, 228 La. 951, 84 So.2d 597 (1955).

55. *Michell v. State Bd. of Optometry Examiners*, 128 So.2d 825 (La. App. 3d Cir. 1961) and *Rogers v. State Bd. of Optometry Examiners*, 126 So.2d 628 (La. App. 3d Cir. 1961), phrasing the standards in terms of discretion to refuse where declaratory relief is not appropriate or definitive under the circumstances.

In the federal system, the standards are stated as whether the declaratory judgment will settle the particular controversy and clarify legal relations in issue. *Sears, Roebuck Co. v. American Mut. Liab. Co.*, 372 F.2d 435 (7th Cir. 1967).

56. 174 So.2d 164 (La. App. 4th Cir. 1965). The court reasoned that since the plaintiff lacked interest, the grant of declaratory relief would not terminate the controversy since the real party of interest would not be bound by the decree.

57. 227 La. 347, 79 So.2d 333 (1955). Defendant in a tort action pending in federal court sought a declaration of non-liability in state court.

58. In the federal system this would appear to be a factor in determining whether a court should entertain the suit but not necessarily abuse per se. *Weinstein v. Williams-McWilliams Indus., Inc.*, 313 F. Supp. 876 (D.C. Del. 1970).

59. 232 La. 1059, 95 So.2d 825 (1957).

it applicable in two different situations:⁶⁰ On one set of facts it is an exclusive remedy, on the other an alternative remedy. This dual nature is effectuated by the further relief clause of article 1871 conferring jurisdiction to render declaratory judgments "whether or not further relief is or could be claimed."⁶¹ Thus, a court can grant a declaratory judgment where no other remedy is available, and also when the declaratory remedy is alternative: "Alternative (1) indicates the possibility of a combination of prayers; (2) the possibility of alternative actions and prayers, . . ."⁶² As a consequence of this alternative nature, the fact that other relief is prayed for along with the declaratory prayer should not constitute a bar to the declaration. Conversely, the prayer for the declaration should not preclude the other relief requested.⁶³ The relief may be declaratory or executory or both.⁶⁴

So long as a declaratory judgment is prayed for alone or is prayed for in the alternative, the Louisiana courts have little problem dealing with this area.⁶⁵ Likewise, when an injunction is sought along with a declaratory judgment, no problems have arisen with the combination of the prayers.⁶⁶ However, when a declaratory judgment and a money judgment were sought in conjunction with each other, the only Louisiana court to consider the matter held that the scope of the declaratory judgments act does not encompass the authority to render a money judgment. In *Burton v. Lumbermen's Mutual Casualty Co.*,⁶⁷ the court evidently considered the request for a money judgment

60. See note 9 *supra* and accompanying text.

61. LA. CODE CIV. P. art. 1871: "Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed."

62. E. BORCHARD, DECLARATORY JUDGMENTS 338 (1941).

63. See *Landers Frary & Clark v. Vischer Prods. Co.*, 201 F.2d 319 (7th Cir. 1953), and *Petrol Corp. v. Petroleum Heat and Power Co.*, 162 F.2d 327 (2d Cir. 1947), to the effect that it is commonplace to combine coercive relief with a declaratory judgment and executory relief may be demanded with declaratory relief.

64. See generally E. BORCHARD, DECLARATORY JUDGMENTS 634 (1941).

65. *Erath Sugar Co., Ltd. v. Broussard*, 120 So.2d 544 (La. App. 1st Cir. 1960).

66. *Slichko v. City of New Orleans*, 235 La. 305, 103 So.2d 454 (1958); *A to Z Paper Co. v. State Dept. of Educ.*, 251 So.2d 643 (La. App. 1st Cir. 1971); *Osburn Funeral Home, Inc. v. State Bd. of Embalmers*, 194 So.2d 185 (La. App. 2d Cir. 1967). While these cases are not authority for the proposition that declarative and coercive relief can be joined, they are at least examples of it being done without objection.

67. 152 So.2d 235 (La. App. 4th Cir. 1963).

for attorney's fees as part and parcel of the declaratory prayer. A reading of the case plainly indicates that the plaintiff requested declaratory relief to ascertain the liabilities of his insurers and also requested that he be awarded attorney's fees. Obviously, the plaintiff combined a prayer for declaratory relief with a prayer for a money judgment. The prayers did not overlap. The declaration requested covered the contractual obligation of the insurer to defend the insured. The money judgment requested was for expenses suffered by the plaintiff as a result of the insurer's refusal to perform as called for in the contract. Neither remedy taken alone gave the plaintiff complete relief. The only logical basis for the decision in *Burton*⁶⁸ is that an action is tied to one form of relief, and that an action can only result in one form of recovery. This view appears to be incorrect in light of the language of Code of Civil Procedure articles 1871 and 862.⁶⁹ If under article 1871 a plaintiff can combine prayers for relief and under article 862 a plaintiff shall receive the relief to which he is entitled, then the granting of both declaratory and executory relief in one action would appear to be proper.

In *Brown v. Mayfield*,⁷⁰ involving a prayer for petitory relief and a declaratory judgment, the court held that a prayer for a declaratory judgment which presents no issue in addition to the petitory aspect does not entitle the plaintiff to a declaratory judgment. This holding appears to be correct in principle. If an issue is fully and effectively adjudicated by one of the remedies prayed for, then granting of the other remedy serves no useful purpose. However, a traditional remedy, which operates in the present or the immediate future, will not as fully adjudicate an issue as will a declaratory judgment which fixes the parties rights as to the future. Where declaratory relief is prayed for in conjunction with other relief, the court should always assure itself that one form of relief will completely adjudicate the issue; if so, then only that relief should be granted. However, if one remedy will not suffice then both should be granted to the extent justified.

68. *Id.*

69. LA. CODE CIV. P. art. 862: "Except as provided in Article 1703, a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief."

70. 45 So.2d 912 (La. App. 2d Cir. 1950).

Supplemental Relief

Article 1878 of the Code of Civil Procedure provides: "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." This provision is to be distinguished from the other further relief clause in article 1871, which permits the granting of declaratory relief in situations where conventional relief would also be appropriate.⁷¹ The provision of article 1878 deals with the effectuation of a declaratory judgment where a party has chosen to ignore it, or a declaratory judgment has proved inadequate. Thus, article 1878 provides a basis for petitioning a court for executory or coercive relief based on a prior declaratory judgment where such relief is necessary or proper. The further relief should extend to awarding money judgments as well as injunctive relief where justified.⁷² The decision in *Burton v. Lumbermen's Mutual*⁷³ recognized that supplemental relief could extend to money judgments by stating that while the Declaratory Judgments Act does not encompass the authority to render money judgments, a declaratory judgment can form a proper basis for an action to recover damages in a subsequent action under article 1878. In *Schreiner v. Weil Furniture Co.*,⁷⁴ the plaintiff on appeal prayed that the declaratory judgment be amended so as to grant specific performance or money damages. Apparently, the request for executory relief was based on the declaratory judgment awarded plaintiff in trial court, thus in effect presenting a demand for supplemental relief. The appellate court upheld the grant of declaratory relief, but refused executory relief on the basis of lack of a justiciable controversy without dealing with the issue of supplemental relief as such. *Womack v. Sternberg*⁷⁵ involved an exchange of property in which plaintiff sued for and obtained a declaratory judgment,

71. See note 63 *supra* and accompanying text.

72. In the federal system a money judgment can properly be based on a declaratory judgment, *Texasteel Mfg. v. Seaboard Sur.*, 158 F.2d 90 (5th Cir. 1946).

73. 152 So.2d 235 (La. App. 4th Cir. 1963).

74. 68 So.2d 149 (La. App. Orl. Cir. 1953). The court did not identify the procedure under which they considered the request for damages. Executory relief was refused where plaintiff failed to show that defendant had not conformed to the agreement as interpreted in the declaratory judgment because demand for performance had not been made under the contract after interpretation.

75. 162 So.2d 119 (La. App. 1st Cir. 1964), *aff'd*, 247 La. 566, 172 So.2d 683 (1965). The supreme court decision did not touch upon declaratory relief, treating only the breach of contract and damage aspects.

and on rehearing amended his petition to seek damages. Defendant argued on appeal that the award of damages was a grant of supplemental relief pursuant to article 1878 and was improper because article 1878 requires that supplemental relief be petitioned for by rule to show cause. The court agreed that article 1878 seemed to require this, but since defendant had not been prejudiced the award was allowed to stand. The thrust of this meager quantity of jurisprudence is that the terms of article 1878 will apparently be given effect by the courts.

Parties

Indispensable parties in an action for a declaratory judgment⁷⁶ are determined by the criteria of article 641.⁷⁷ However, article 1880 governing parties in an action for a declaratory judgment can be read⁷⁸ so as to extinguish the distinction of articles 641-42⁷⁹ between indispensable and necessary parties.

76. In the following cases parties have been held to be indispensable: Board of Comm'rs for Atchafalaya Basin Levee Dist. v. St. Landry Parish School Bd., 242 La. 285, 136 So.2d 44 (1961) (federal government held to be an indispensable party in suit over payment for expropriation where the federal government was to eventually bear the cost); Humble Oil & Ref. Co. v. Jones, 241 La. 661, 130 So.2d 408 (1961) (lessors held to be indispensable parties in a suit to resolve a unitization problem); Horn v. Skelly Oil Co., 221 La. 626, 60 So.2d 65 (1952) (holder of mineral reservation held to be an indispensable party to a suit to determine ownership of $\frac{1}{4}$ of mineral rights); Warner v. Clarke, 232 So.2d 99 (La. App. 2d Cir. 1970) (landowner indispensable party to a suit to have certain land declared subject to public use); Consolidated Credit Corp. v. Forkner, 219 So.2d 213 (La. App. 1st Cir. 1969) (first mortgagee held to be indispensable party to a suit to determine how the proceeds of the sale of the judgment debtor's home would be distributed).

77. LA. CODE CIV. P. art. 641: "Indispensable parties to an action are those whose interest in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action.

"No adjudication of an action can be made unless all indispensable parties are joined therein."

78. LA. CODE CIV. P. art 1880: "When declaratory relief is sought, all persons *shall be made parties* who have or claim any interest which could be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard." (Emphasis added.) The word *shall* makes the requirement of the article mandatory, hence the party would be indispensable in all cases.

79. LA. CODE CIV. P. art. 642: "Necessary parties to an action are those whose interest in the subject matter are separable and would not be directly affected by the judgment if they were not before the court, but whose joinder would be necessary for a complete adjudication of the controversy.

The criteria remain the severability of the interest and the degree to which a judgment would affect the interest as provided in articles 641-42. The court made this clear in *Humble Oil & Refining Co. v. Jones* by using the traditional criteria to determine whether or not parties are indispensable.⁸⁰ In *Parker v. Tillman*,⁸¹ where the court granted a request to interpret an employment contract, the court refused to declare a party claiming an interest indispensable since his interest was not directly affected and he was not bound by the judgment.

Although article 1880 does not destroy the distinction between indispensable parties and necessary parties, it does give wide latitude to a court to require joinder or impleading of parties. Failure or inability to join affected persons might well constitute grounds for discretionary refusal to render a declaratory judgment even where the party is not indispensable, if without him a declaratory judgment would not terminate the controversy.

Article 1880 further provides that when the validity of an ordinance or franchise is called into question, the municipality is an indispensable party; if a statute, ordinance, or franchise is alleged to be unconstitutional, then the attorney general is an indispensable party. The courts have generally given effect to these terms.⁸²

Pleading

Since an action for a declaratory judgment is an ordinary action governed by the rules regulating such actions, it follows that pleading differs in no material aspect from pleading in any other ordinary action.⁸³ Thus, article 854⁸⁴ applies, and no technical forms of pleading are required.⁸⁵

"An adjudication of an action may be made even if all necessary parties are not joined therein, but when timely objection is made to the nonjoinder of a necessary party the court shall require his joinder if he is subject to its jurisdiction."

80. 241 La. 661, 130 So.2d 408 (1961). The court applies LA. CODE CIV. P. arts. 641 and 642 in determining whether parties are indispensable in an action for a declaratory judgment.

81. 228 La. 214, 81 So.2d 866 (1955).

82. *Osburn Funeral Home Inc. v. State Bd. of Embalmers*, 194 So.2d 185 (La. App. 2d Cir. 1967).

83. *Cf.* LA. CODE CIV. P. art. 1871, comment.

84. LA. CODE CIV. P. art. 854.

85. *See Poynter v. Fidelity & Cas. Co.*, 140 So.2d 42 (La. App. 3d Cir. 1962).

Conclusion

The use of declaratory relief in Louisiana was greatly hampered by the view set forth in *Burton v. Lester* that declaratory relief was an extraordinary remedy to be refused where another adequate remedy existed. This view was overruled legislatively in 1960, but since that time there has been no noticeable increase in the use of declaratory judgments perhaps because of *Burton's* continuing detrimental influence.

The remedy offers significant advantages over other forms of relief, particularly with respect to situations involving interpretation of contracts, documents and legislation by permitting judicial determination of rights and relations before disruption of the status quo. With the many possible applications of declaratory relief, the practicing bar should acquaint themselves with the device so that the most efficient legal service can be rendered to the public.

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